Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

LILLIAN WORTHING WYSHAK, PETITIONER

v.

AMERICAN SAVINGS BANK, F.A., ET AL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In Propria Persona

50 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether federal court procedures which denied Petitioner the opportunity for a hearing at a meaningful time and in a meaningful manner resulted in a denial of due process to Petitioner under the Fifth and Fourteenth Amendments; and whether the procedures themselves resulted in denial of Petitioner's rights under the Excessive Fines Clause or Cruel and Unusual Punishments Clause (or both) of the Eighth Amendment; as well as denial of substantive due process rights under the Fifth and Fourteenth Amendments, resulting in a "grossly excessive" loss to Petitioner by granting relief from Stay to the Bank which allowed the Bank to complete the foreclosure sale of Petitioner's home of 28 years.

2. Whether the Eighth Amendment guarantees against excessive fines and cruel and unusual punishment were denied to Petitioner by reason of the federal court orders which precluded Petitioner from working out a plan of reorganization in her Chapter 11 bankruptcy proceeding by lifting the Automatic Stay to allow sale of her home of 28 years prior to the hearing date for the Plan which was already pending.

3. Whether Petitioner's Complaint in the adversary action should not have been dismissed; or at least whether it should have been dismissed with leave to amend.

PARTIES TO THE PROCEEDING

Petitioner:

LILLIAN WORTHING WYSHAK

Respondents:

AMERICAN SAVINGS BANK, F.A.,
MARIO J. ANTOCI
JOHN DONAHUE
SHEILA BROWN
WILLIS Mc CLUNG

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No.

LILLIAN WORTHING WYSHAK, PETITIONER

v.

AMERICAN SAVINGS BANK, F.A., ET AL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lillian Worthing Wyshak, on her own behalf, petitions for a Writ of Certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Orders of the Court of Appeals and the Order denying Rehearing are unreported.

JURISDICTION

The Order of the Court of Appeals was entered on March 7, 1996. A petition for rehearing was denied on April 17, 1996 (App., infra, at pp. 19-23). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides "... nor shall any person... be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment provides "... nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Eighth Amendment provides "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

STATEMENT OF THE CASE

This case began on May 26, 1993, with Petitioner's filing of a Voluntary Petition under Chapter 11 of the Bankruptcy Code (Title 11 of the U.S. Code) the day before a scheduled foreclosure sale of Petitioner's home of 28 years, 602 Hillcrest Road, Beverly Hills, California 90210, pursuant to a trust deed on the property held by American Savings Bank.

Foreclosure proceedings had begun when payments on the loan were only two months delinquent. The Bank sought relief from the Stay and it was granted by the Bankruptcy Court on February 7, 1994, as of April 11, 1994 (App., infra, at pp. 1-7).

On February 18, 1994, Petitioner appealed to the U.S. District Court from the Order lifting the Stay.

On April 6, 1994, the Stay was extended by the U.S. District Court "until the final determination in the United States District Court of the Appeal filed herein from the Order of the Bankruptcy Court entered on February 11, 1994, and that said Order is hereby vacated. ...Debtor shall pursue her appeal on an expedited basis to be ready for hearing within 60 days." (App., infra, at pp. 8-9).

After a hearing on June 6, 1994, the February 11, 1994, Order of the Bankruptcy Court was affirmed with a 45 day Stay of the Order to allow debtor [Petitioner] to propose and file a Plan of Reorganization. (App., infra, at pp. 12-13).

Petitioner timely filed a proposed Disclosure Statement and Plan pursuant to that Order and a hearing thereon was set in the Bankruptcy Court on September 29, 1994.

Petitioner was prepared to present expert testimony in support of her Plan of Reorganization at the September 29, 1994 Bankruptcy hearing. However, by an Order entered on August 24, 1994, District Court Judge Real denied Petitioner's Motion for Rehearing on his affirmance of the Bankruptcy Court's Order of February 11, 1994, granting relief from the Automatic Stay, and allowing the Bank to proceed with its foreclosure sale of Petitioner's home (subject to the 7 day waiting period of California Civil Code §2924g(d)). (App., infra, at pp. 16-18).

On March 7, 1996, the Ninth Circuit Court of Appeals affirmed the lifting of the Stay without specification of reasons, and denied rehearing on April 17, 1996. (App., infra, at pp. 19-23).

With respect to the related adversary action, on January 26, 1994, Petitioner filed in the Bankruptcy Court an adversary complaint entitled "Complaint for Damages; Breach of Implied Covenant of Good Faith and Fair Dealing; Negligent Infliction of Emotional Distress; Intentional Infliction of Emotional Distress; Unconscionability of Contract; Cancellation of Adhesive and Unconscionable Contract Terms; Demand for Jury Trial." On April 21, 1994, the Bankruptcy Court entered its Order Dismissing the Complaint Without Leave to Amend (App., infra, at pp. 10-11); which was affirmed by the United States District Court by Order entered July 21, 1994

(App., infra, at pp. 14-15). The Ninth Circuit Court of Appeals affirmed on March 7, 1996, without specifying reasons (App., infra, at pp. 19-21) and denied rehearing April 17, 1996 (App., infra, at pp. 22-23).

REASONS FOR GRANTING THE PETITION

This proceeding involves questions of federal law of exceptional importance. There have been serious violations of Petitioner's rights under the Fifth, Fourteenth, and Eighth Amendments to the Constitution. Material points of fact and law were overlooked in the Order of the Ninth Circuit Court of Appeals, dated March 7, 1996, (App., infra, at pp. 19-21) which affirmed the Orders of the District Court without specification of any grounds.

The Ninth Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the lower Courts in affirming the decisions of the lower Courts erroneously, in view of the facts and circumstances of this case and the rules of law applicable thereto, as follows:

1. Petitioner has been denied due process of law under the Fifth and Fourteenth Amendments, due to substantive and procedural errors in the proceedings which resulted in her losing her home of 28 years. Petitioner had no opportunity to be heard at a meaningful time and in a meaningful manner before suffering her very grievous loss.

(a) The Ninth Circuit Court of Appeals erroneously affirmed the District Court's affirmance of the Bankruptcy Court's relief from the Automatic Stay upon sale of Petitioner's home prior to an evidentiary hearing which had already been set on the Bankruptcy Court's calendar at which Petitioner was to present evidence

in support of her Disclosure Statement and Plan of Reorganization (thus killing the Plan by removal of the asset which was at the heart of it), contrary to the purpose and spirit of the Constitutional Bankruptcy Powers and the Bankruptcy Code, the purpose of which is to protect debtors as well as creditors. Petitioner had no opportunity to be heard at a meaningful time in a meaningful manner before her home was taken away.

(b) The Ninth Circuit Court of Appeals erroneously affirmed the District Court's affirmance of the Bankruptcy Court's relief from Automatic Stay upon sale of Petitioner's home, where the Judge of the District Court, after a cursory reading of Petitioner's Plan while acting in an appellate capacity and without affording Petitioner any opportunity to have an evidentiary hearing on her Plan in the Bankruptcy Court or in his Court, ruled against her Plan, thus usurping the trial court function of the Bankruptcy Court while he was sitting in an appellate capacity. This was done without any evidentiary basis. Petitioner was prepared to present the testimony of an expert economist from the UCLA Economic Forecasting Project to testify on her behalf, together with other evidence, at the calendared Bankruptcy hearing on September 29, 1994, but was never afforded an opportunity to present that evidence because the foreclosure sale after the lifting of the Stay went forward on August 30, 1994.

The fundamental requirement of due process is the opportunity to be heard and the opportunity must be granted at a meaningful time and in a meaningful

manner. Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Morrissey v. Brewer, 408 U.S. 471 (1972).

The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. Joint Anti-fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951). (Frankfurter J. concurring).

In Shelley v. Kraemer, 334 U.S.1 (1948), it was held that the action of the States to which the Fourteenth Amendment, has reference includes action of the state courts and state judicial officials.

Buckley v. Valeo, 424 U.S.1 (1976) held that Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1958) held that due process under the Fifth Amendment includes Equal Protection for federal purposes. See also Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

These cases establish that the enforcement of the Bank's rights through the use of the Federal Courts to lift the Automatic Bankruptcy Stay is subject to Constitutional limitations in spite of the fact that the underlying transactions involve a private contract.

The applicability of one Constitutional Amendment does not pre-empt the guarantees of another. The question is not which Amendment controls but whether either Amendment is violated. U.S. v. James Daniel Good Real Property,

510 U.S. 43, 114 S.Ct. 492; 126 L.Ed.2nd 490, 500 (1993).

2. The Eighth Amendment guarantees against excessive fines and cruel and unusual punishment were denied to Petitioner by reason of the Orders of the Federal Courts lifting the Automatic Bankruptcy Stay to allow the foreclosure sale of her home of 28 years, under the circumstances of this case.

The lifting of the Automatic Stay, allowing the foreclosure sale of Petitioner's home was contrary to the prohibitions of the Eighth Amendment to the Constitution, inasmuch as it allowed a forfeiture of her home through the application of State and Federal laws with the assistance of the Federal Courts in violation of Petitioner's Constitutional rights to be protected from excessive fines and cruel and unusual punishment.

The Eighth Amendment's prohibition against cruel and unusual punishment is concerned with matters such as the duration or conditions of confinement. Alexander v. U.S., 509 U.S. 544, 113 S.Ct. 2766, 2755 (1993), reh. den. 114 S.Ct. 295. The rights protected are personal rights affecting the quality of life. Petitioner contends that the taking away of the intangible and hedonic values integral to her life in her home of 28 years is an assault on personal rights which are also protected by that clause of the Eighth Amendment.

Trop v. Dulles, 356 U.S. 86 (1958), involved a World War II soldier who had "deserted" for under one day, was court-martialed, convicted sentenced to three

years at hard labor, forfeiture of all pay, and a dishonorable discharge. An additional consequence was loss of his citizenship by reason of the Nationality Act of 1940.

The court stated that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a non-penal effect. The court determined that the law in question was a penal law. The issue was whether the Constitution permits Congress to take away citizenship as a punishment for crime or whether denationalization is cruel and unusual punishment within the meaning of the Eighth Amendment. Does it subject the individual to a fate forbidden by the principles of civilized treatment guaranteed by the Eighth Amendment? The court said that the basic concept underlying the Eighth Amendment is nothing less than the dignity of man... the words of the Amendment are not precise, and... their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society... Trop v. Dulles, supra.

The court held that the use of denationalization as a punishment is barred by the Eighth Amendment. "There may be no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community.

...He may be subject to banishment, a fate universally decried by civilized people..." Trop v. Dulles, supra at 101, 102.

By the forfeiture of her home and her eviction therefrom, Petitioner suffered similar punishment.

The psychological effect of tearing Petitioner away from her home of 28 years resulted in cruel and unusual punishment to her. In trying to obtain the help of the Courts in working out her debt to the Bank, she risked and suffered the stigma, humiliation, embarrassment, loss of credit, loss of prestige and status and dignity, by filing a bankruptcy proceeding. It was to no avail. She lost her home anyway, causing the sudden change from her being a freeholder and mistress of the manor to landless peasant, resulting in a feeling of rootlessness, banishment, and removal from acceptable society; with destruction of the center of her family and of her entire life - she ended like a turtle torn out of its shell.

Trop v. Dulles, supra, was followed in a recent case holding that the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even though the inmate does not suffer serious injury. The court reiterated that the meaning of prohibition of cruel and unusual punishments is drawn from the evolving standards of decency that mark the progress of a maturing society. Hudson v. McMillian, 503 U.S. 1, 8 (1992). In his concurring opinion (503 U.S. at 26), Justice Blackmun further expanded the analysis, saying that psychological pain, is a cognizable injury

for Constitutional purposes.

> "I do not read anything in the Court's opinion to limit injury cognizable under the Eighth Amendment to physical injury. It is not hard to imagine inflictions of psychological harm -- without corresponding physical harm -- that might prove to be cruel and unusual punishment."
>
> "As the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain', rather than 'injury'... 'Pain' in its ordinary meaning surely includes a notion of psychological harm. I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes. If anything, our precedent is to the contrary. See Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (recognizing Article III standing for 'aesthetic' injury); Brown v. Board of Education, 347 U.S. 483, 494 (1954) (identifying school children's feelings of psychological inferiority from segregation in the public schools)."

Thus, in this particular case, the effect on this Petitioner of taking away her home without exhaustion of all possible other alternatives resulted in cruel and unusual punishment of one who

has committed no crime, in violation of her rights under the Eighth Amendment.

If the accessory punishment and main punishment are inseparable, and one is void, the entire law prescribing the punishment is void. See, Weems v. U.S., 217 U.S. 349 (1909).

In other words, if the Bank could not take its pound of flesh without drawing so much of Petitioner's blood, the remedy should have been stayed and another remedy worked out.

Respect for the sanctity of the home has been embedded in our traditions since the origins of the Republic. A Year Book case of 1455 held that in civil cases the sheriff could not breach doors to arrest for debt or trespass, for the arrest was then only in the private interests of a party. Every man's home is his castle. Payton v. N.Y., 445 U.S. 573, 601 (1980).

What happened in the case at bar was far worse than breaking the doors of a man's house to arrest him in a civil suit in debt. Here, the whole house was taken away, contrary to the spirit of remarks attributed to William Pitt, Earl of Chatham, who expressed the principle "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter -- all his force dares not cross the threshold of the ruined tenement!" Miller v. U.S., 357 U.S. 301, 2 L.Ed 21 1332, 1337 (1958), cited in Payton, supra, at 602. In the case at bar the King is replaced by the

Court which by its order lifting the Stay accomplished such an intrusion and forfeiture in violation of Constitutional rights of Petitioner.

In addition to the fact that the taking of Petitioner's home inflicted cruel and unusual punishment upon her, it further effectuated the imposition of an excessive fine upon her, in violation of the Eighth Amendment, through the action of the Federal Courts.

Again, Petitioner has committed no crime, and yet her home was wrested from her, so she ended up without her home just as if a forfeiture had been decreed under the narcotics or money laundering laws. The effect was a fine against her, and that fine was excessive under the Eighth Amendment.

This Court has held that a forfeiture under RICO, 18 U.S.C. §1963, may possibly result in an "excessive" penalty within the meaning of the Eighth Amendment's Excessive Fines Clause. Alexander v. U.S., 509 U.S. 544, 113 S.Ct. 2766, 2776 (1993); and in his concurring and dissenting opinion in that case, Justice Souter stated that all punishments are subject to analysis for proportionality, Id. at 2784, citing Austin v. U.S., 509 U.S. 602, 113 S.Ct. 2801 (1993). The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, as punishment for some offense. Alexander, supra, at 2775, citing Austin, supra, 113 S.Ct. 2801, 2805 - 2806.

In Austin v. U.S., 509 U.S. 602, 113 S.Ct. 2801 (1993), under 21 U.S.C. 881,,

it was held that the Eighth Amendment Excessive Fines Clause applies to a civil in rem forfeiture of property involved with drug offenses, whether the forfeiture is criminal or civil, even if it serves some remedial purpose, because it is in part a payment to a sovereign for some offense. [Whether there was payment or forfeiture to a sovereign or payment or forfeiture to the Bank by order of the sovereign's Federal Courts does not change the effect on the person whose property is taken, so the principle that the action of the government includes the action of its courts of Shelly v. Kraemer, 344 U.S.1 (1948) should apply.] The determination of whether a forfeiture is constitutionally "excessive" was left to the lower courts. In United States of America v. Real Property Located in El Dorado County, 59 F.3rd 974 (9th Cir. 1995), it was reiterated that an in rem forfeiture punishes the property owner and is subject to the Excessive Fines clause of the U.S. Constitution, and it was held that a PROPORTIONALITY approach is appropriate to determine whether an in rem forfeiture violates the Excessive Fines clause. In determining proportionality, the harshness of the forfeiture is to be considered, taking into account not only the fair market value of the property but also the intangible, subjective value of the property (e.g., whether it is the family home), the hardship to the owner, the culpability of the owner, the harm caused by the illegal activity. Petitioner, in the case at bar, has committed no crime, and yet she is being punished by having her home of 20 years taken away from her just because she could not, during the worst recession our Country has had since 1929, make current

payments on her loan from American Savings Bank. A missed payment is not money lost to American Savings. It is added to the balance owed and interest is accrued on it. Petitioner at no time denied any part of her liability, either for principal or for interest, nor interest on interest. The gist of it is that simply for being unable to make payments temporarily, she is penalized by having her home seized and forfeited. Because a sudden depression hit the whole area, during which Petitioner's $900,000 equity went into hiding, all maximum loans made on Beverly Hills properties in 1990 would have been equally badly secured by the time of the foreclosure. The Bank could not foreclose on loans on which payments were current even it they were undersecured. So in effect they took the house as a penalty for late payments. To make matters worse, the Bank then turned around and sold Petitioner's home to a stranger for only $1,220,000 when at all times Petitioner had offered to ultimately pay the whole sum due which was over $2,000,000, within a feasible plan under which the Bank would be secured by a continuing lien on the property. Instead, the Bank maliciously seized the home and sold it to a stranger for a small amount, gleefully depriving Petitioner of all the intangible values and the hedonic values thereof which were so precious to her, all with the help of the Federal Courts and contrary to the spirit of the Constitutional Bankruptcy Power. This is punishment of Petitioner, just as an <u>in rem</u> forfeiture for an offense would be. It is a fine without a crime. It is an excessive fine because it takes away the one tangible asset which was the center of the life of Petitioner and her family, thus violating

Petitioner's Eighth Amendment rights.

Furthermore, to one who was so attached to her home of 28 years, taking it away without giving Petitioner a chance to complete her Plan of Reorganization to try to keep the home also resulted in cruel and unusual punishment to Petitioner, again without a crime, just for being late with payments. Although what was taken may have had no present economic value, the capital base for future appreciation was also a potential economic value which was stripped away from Petitioner.

That it was done by the Federal Courts' lifting of the Automatic Stay of the Bankruptcy and sale of Petitioner's home without a proper evidentiary hearing on Petitioner's Disclosure Statement and Plan of Reorganization after just a cursory look by the District Court at the Plan which had yet to be revised compounded the wrong which violated Petitioner's Eighth Amendment rights and added to the violations of Petitioners Fifth and Fourteenth Amendment rights. This is a case in which the concept of proportionality should be applied and the power of the Court should be exercised to modify the contractual rights of the Bank while still protecting its security interest, as could be accomplished by voiding the sale to again subject the home to the powers of the Bankruptcy Court so Petitioner can go forward with her Plan of Reorganization.

All the aforesaid matters resulted in deprivation of the constitutional rights of appellant under the Fifth, Fourteenth, and Eighth Amendments to the Constitution

of the United States of America, and these wrongs should now be redressed by reversing the orders of the lower courts.

3. Petitioner's Adversary Complaint should not have been dismissed or, at least, should have been dismissed with permission to amend. If it be said that Petitioner consented to the forfeiture of her home by signing the note and trust deed, the answer to that is that the consent to the portion of it that would allow forfeiture after a completely unexpected and virtually unprecedented and temporary plunge in the economy, then the answer is that the consent was not real and that term of the contract was adhesive, oppressive confiscatory, unconscionable and void. The loan agreement was a standardized contract which was drafted by the Bank, the party of far superior strength in the transaction, and relegated to Petitioner only the opportunity to adhere to the contract or reject it. Petitioner raised these contentions, among others, in the adversary action which is one of the two cases covered by this petition, as well as the fact that every contract made in California is subject to the Implied Covenant of Good Faith and Fair Dealing and breach of that covenant gives rise to tort damages. Furthermore, every contract in the USA is subject to the constitutional Bankruptcy Power and the right of a party to the contract to seek the aid of the Courts in modifying and balancing contractual rights of the parties in order to help debtors to recover financially while still preserving the property rights of creditors by retention of liens and otherwise. The Bank's vigorous opposition to Petitioner's

attempts to secure the aid of the Courts in making an acceptable Plan of Reorganization in her Chapter 11 Bankruptcy proceeding and its pressing for denial of Petitioner's Constitutional Rights, as well as lack of cooperation in working out a plan before the Chapter 11 filing, constituted elements of bad faith.

The Adversary Complaint should not have been dismissed and Respondents should be required to answer it or at least Petitioner should be permitted to amend, under Conley v. Gibson, 355 U.S. 41 (1957), which held that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

In this case, Petitioner seeks orders that the judgments below be reversed; that the sale of her home which was made following the lifting of the Bankruptcy Stay be set aside in order for Petitioner to make a Plan of Reorganization under which she may keep her home and pay the balance she owes to American Savings Bank under reasonable terms; and that she be awarded damages for wrongful eviction, loss of use of her home, emotional distress, and costs of litigation. Petitioner respectfully requests that the Court give consideration to her case and grant her Petition.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LILLIAN WORTHING WYSHAK
In Propria Persona

July, 1996

Filed Feb. 7, 1994
Entered Feb. 11, 1994

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	Case No. LA 93-28978 KL
LILLIAN WORTHING WYSHAK, Debtor.	Chapter 11
	MOTION NO. M93-02429 KL
AMERICAN SAVINGS BANK, F.A., Movant,	**MEMORANDUM ON MOTION FOR RELIEF FROM STAY FILED BY AMERICAN BANK, F.A. and ORDER THEREON**
LILLIAN W. WYSHAK, Respondent.	DATE: 12-20-93 TIME: 3:00 P.M. PLACE: 1339

This case was commenced by a voluntary petition under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") on May 26, 1993. The debtor is Lillian Worthing Wyshak ("Wyshak" or "Debtor"). The primary asset of the bankruptcy estate is the Debtor's residence located at 603 Hillcrest Road, Beverly Hills, California (the "Property").

American Savings Bank, F.A. ("Bank") holds a first priority trust deed on the Property to secure a debt in the approximate amount of $1,916,000 as of August 1993. There are no other encumbrances on the Property except for delinquent real estate taxes in the approximate amount of approximately $3,600. Payments to the Bank are $11,022.21 per month.

No payments have been made to the Bank since October 1992. The Bank seeks relief from the automatic stay imposed by Section 362 on the grounds that the Bank's interest is not adequately protected (Section 362(d)(1)) and on the grounds that the Debtor has no equity in the Property and the Property is not necessary for an effective reorganization (Section 362(d)(2)).

The Debtor is a 65 year old woman with impressive credentials and a distinguished career. She is a lawyer, certified by the State Bar of California as a specialist in taxation law, a licensed real estate broker, and a certified public accountant (inactive license). She has raised four daughters, three of whom are in graduate school and the fourth of whom is a resident physician at a university hospital. The Debtor testified that her income declined to such an extent that she has been unable to make the monthly payments on the house, although she has maintained it in good condition. In addition, she has maintained insurance on the house for $1,000,000 in replacement value. She has lived in the house for approximately 28 years and conducts much of her primary business (as a real estate broker) from

the house as well as residing there. The case was filed to protect her interest in the Property from a foreclosure sale by the Bank that would dispossess her from her home and from adverse capital gains tax consequences of approximately $500,000 that would arise out of a foreclosure sale.

VALUATION OF THE PROPERTY

The house a large 8 bedroom, 6.5 bath, Hawaiian-style residence located on a corner lot in Beverly Hills. It was originally built approximately 38 years ago but was enlarged in 1969. The house is apparently in good condition and has some unique amenities.

The Bank alleges that the market value of the Property was $1,750,000 as of July 13, 1993 (Declaration and expert testimony of Lily B. Leong, certified real estate staff appraiser for the Bank). The Debtor alleges that the market value of the Property is no less than $2,200,000 as of June 1, 1993 (Declaration and expert testimony of Kenneth E. Simmons, certified general appraiser). The Debtor further asserts that the Property can be sold for $2,400,000 given sufficient time for market exposure and an anticipated upswing in the depressed real estate market.

After due consideration of the testimony of the expert witnesses, the comparables used by each, and the testimony of the Debtor, I conclude that the market value of the Property at the present time is approximately and no more than $2,200,000. The Debtor's belief that the Property could be sold for $2,400,000

or more depends on an improvement in market conditions that cannot be predicted. The market may improve but no one can say if or when that will happen. The Property has been listed at $2,400,000 since May 1993 without any offers at that price.

ADEQUATE PROTECTION

Since August 1993, the debt to the Bank has continued to accrue at the rate of approximately $11,000 per month. Therefore, at the present time, the debt is approximately 1,982,000.00. At a value of $2,200,000, the amount over and above that required to pay the Bank is approximately $218,000, not including the necessity to pay outstanding real estate taxes. It is not reasonable to assume that there will be no costs of sale. Even if the Debtor were to broker the sale with no commissions for herself or to a participating broker, the margin for error in valuation is less than 10%. Costs of sale of 6% would reduce the margin for error in evaluation to approximately $86,000, not including outstanding taxes. No sale is on the horizon. In the meantime, the debt continues to accrue. The risk of the debt outstripping any realizable sale price rests on the Bank. The court concludes that the value of the Property, in and of itself, does not provide adequate protection within the meaning of Section 362(d)(1) for a period of longer than 60 days.

The Debtor seeks the opportunity to market the Property or otherwise secure the means for resuming payments to the Bank until July 1, 1995, at which time she

offers to pay interest on the interest presently accruing, re-amortized with the loan balance over the life of the loan. She has offered as additional adequate protection, to assign a $500,000 face value life insurance policy on her 70-year old former husband's life to the Bank and to pay the premiums on the policy. The policy has no present cash value. The Debtor has further offered to share with the Bank on a 50-50 basis any sale proceeds of the Property over and above $2,000,000, with sale to take place at the Debtor's sole option or at her death. The Bank has declined to voluntarily accept this offer as adequate protection of its interest.

The offer to resume payments on a reamortized debt in July 1995 might be an element of a plan of reorganization that could be proposed by the Debtor but does not offer adequate protection to the Bank, either alone or in conjunction with, the other offers of adequate protection. The confirmation process offers protections to creditors whose debts are reorganized in Chapter 11 proceedings. Those protections are not available in this offer of adequate protection and creditors have a right to insist that such protections not be abrogated. An interest in the life insurance policy offers insufficient present protection to the Bank to require the Bank to accept it as a substitute for present payment or timely adjudication of their right to resort to their collateral. The offer to split possible "equity" proceeds suffers from the same legal infirmity and, given the present value of the collateral and the accruing debt, is not likely to produce any economic benefit for the Bank which would constitute

adequate protection.

Therefore, the court finds and concludes that the Bank is not adequately protected and is entitled to relief from stay under Section 362(d)(1) effective April 11, 1994.

EQUITY AND NECESSITY FOR AN ADEQUATE REORGANIZATION

Based on the value of the Property, there is some equity in the Property for the Debtor at the present time. Entitlement to relief under Section 362(d)(2) requires a finding of no equity in the Property for the Debtor and that the Property is not necessary to an effective reorganization. The existence of equity in the Property for the Debtor requires this court to deny relief under Section 362(d)(2) at this time. It is worthy of note, however, that the Debtor has been in Chapter 11 proceedings for over 8 months and has not proposed a plan of reorganization. It may be that the Debtor is unable to do so. The burden of reorganization is on the Debtor. Confirmation of a plan of reorganization requires not only careful compliance with the requirements of 11 U.S.C. §1129, but also feasibility. Mere hopes are not enough to support a plan, absent the consent of the creditors who must bear the burden of a failure to succeed. One of the primary purposes of bankruptcy is to give a debtor some breathing room as the debtor tries to establish an economic "fresh start". Nonetheless, the moratorium on actions against the debtor and property of the estate provided by Section 362 is not indefinite and

creditors are not required to wait until uncertain market conditions have taken a turn in favor of the debtor.

CONCLUSION

Based on the foregoing, relief from stay is granted effective in favor of the Bank under Section 362(d)(1) effective April 11, 1994 to pursue its remedies under non-bankruptcy law with regard to its interest in the Property.

IT IS SO ORDERED.

Dated: Feb. 7, 1994

/s/ Lax
Kathleen T. Lax
United States
Bankruptcy Judge

Filed Apr. 6, 1994

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re	District Court Case No. 94-1607R
LILLIAN WORTHING WYSHAK,	Case No. LA 93-28978 KL
Debtor.	Chapter 11
	ORDER EXTENDING AUTOMATIC STAY
AMERICAN SAVINGS BANK, F.A.,	
Movant,	
LILLIAN W. WYSHAK,	
Respondent-Appellant	

The Court has considered the EX PARTE APPLICATION TO EXTEND AUTOMATIC STAY PENDING APPEAL and REQUEST FOR JUDICIAL NOTICE; the Automatic Stay imposed against American Savings Bank as of May 26, 1993, the date of the filing of debtor's Voluntary Petition for Bankruptcy (Chapter 11); the Bankruptcy Court's MEMORANDUM ON MOTION FOR RELIEF FROM STAY and ORDER THEREON; the DECLARATION OF LILLIAN W. WYSHAK wherein it appears that American

Savings Bank will commit the acts restrained by the Automatic Stay, namely, will sell the home of Lillian W. Wyshak, debtor-appellant, on April 12, 1994, unless the stay is extended.

It further appears that Lillian Worthing Wyshak, debtor, will suffer immediate and irreparable injury, loss and damage, unless said stay is extended until the final determination of her appeal from said order, in that she will be divested of her unique home the loss of which cannot be adequately compensated for by money damages and with respect to which she has no adequate remedy at law.

IT IS ORDERED that the Automatic Stay be extended until the final determination in the United States District Court of the appeal filed herein from the Order of the Bankruptcy Court entered on February 11, 1994; and that said order is hereby vacated. Furthermore, the Request for Judicial Notice is granted. Debtor shall pursue her appeal on an expedited basis to be ready for hearing within 60 days.

Dated: April 6, 1994

MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

Filed Apr. 19, 1994
Entered Apr. 21, 1994

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LILLIAN WORTHING WYSHAK, Plaintiff, vs. AMERICAN SAVINGS BANK, F.A., MARIO J. ANTOCI, JOHN DONAHUE, SHEILA BROWN WILLIS MCCLUNG, and DOES 1 Through 60, Defendants.	)	Case No. LA 93-28978 KL Adv. No. AV 94-01024 **ORDER DISMISSING COMPLAINT WITHOUT LEAVE TO AMEND**

American Savings Bank's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) came on for hearing on March 16, 1994 at 2:30 p.m. The Court having reviewed pleadings and listened to the argument presented by the parties,

IT IS HEREBY ORDERED THAT the Adversary Proceedings, Lillian Worthing Wyshak v. American Savings Bank, et al., Adv. No. AV 94-01024, Debtor Lillian Worthing Wyshak's Chapter 11 Bankruptcy, LA 93-28978-KL, is dismissed without leave

to amend as to all defendants.

Dated: Apr. 19, 1994

Kathleen T. Lax
THE HONORABLE
KATHLEEN LAX
U.S. Bankruptcy
Court Judge

Filed June 20, 1994
Entered June 22, 1994

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	District Court Case No. 94-1607R
LILLIAN W. WYSHAK,	Case No. LA 93-28978 KL
Debtor.	MO 93-02429
	Chapter 11
AMERICAN SAVINGS BANK, F.A., Movant, Appellee	**ORDER AFFIRMING BANKRUPTCY COURT'S ORDER ENTERED 2/11/94, AND DENYING REQUEST FOR CONTINUANCE; ORDER GRANTING REQUEST FOR JUDICIAL NOTICE; ORDER EXTENDING STAY OF 11 USC §362 FOR 45 DAYS**
vs.	
LILLIAN W. WYSHAK, Respondent, Appellant	

This matter duly came on for hearing in the Courtroom of the Honorable Manuel L. Real, United States District Judge, on June 6, 1994. Debtor appeared In Propria Persona, and American Savings Bank was represented by Emily Miller, Esq. of Pircher, Nichols & Meeks.

The Court has considered APPELLANT'S APPEAL FROM THE ORDER OF THE BANKRUPTCY COURT ENTERED February 11, 1994; APPELLANT'S APPLICATION FOR CONTINUANCE OF FINAL HEARING ON BANKRUPTCY APPEAL AND FOR AN ORDER EXTENDING AUTOMATIC STAY OF §362; REQUEST FOR JUDICIAL NOTICE; DECLARATION OF LILLIAN WORTHING WYSHAK and POINTS AND AUTHORITIES filed herein on June 6, 1994; the AUTOMATIC STAY imposed against American Savings Bank as of May 26, 1993, the date of the filing of Debtor's Voluntary Petition for Bankruptcy (Chapter 11); the ORDER EXTENDING AUTOMATIC STAY entered herein on April 7, 1994; and the Notice of Entry of a Notice of Appeal on June 2, 1994, in a related case in the same Bankruptcy case numbered AD 94-01024, which has been assigned District Court Case No. CV 94-3649-IH.

IT IS ORDERED that the Order of the Bankruptcy Court entered February 11, 1994, granting relief from stay under 11 U.S.C. §362(d)(1) is affirmed; and debtor's application for continuance of the final hearing of debtor's appeal therefrom is denied; PROVIDED, HOWEVER, that EXECUTION OF THIS ORDER IS STAYED FOR 45 DAYS IN ORDER TO ALLOW DEBTOR TO PROPOSE AND FILE A PLAN OF REORGANIZATION.

Appellant's Request for Judicial Notice is granted.

Dated: June 20, 1994

MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

Filed July 18, 1994
Entered July 21, 1994

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re: LILLIAN WORTHING WYSHAK, Debtor-in-Possession.	District Court Case No. CV-94-3649-R Bankruptcy Court Case No. LA 93-28978 KL Chapter 11
LILLIAN WORTHING WYSHAK, Appellant, vs. AMERICAN SAVINGS BANK, F.A., MARIO J. ANTOCI, JOHN DONAHUE, SHEILA BROWN WILLIS MCCLUNG, ET AL., Respondents.	Adv.Case No. AV 94-01024 **ORDER AFFIRMING BANKRUPTCY COURT ORDER DISMISSING ADVERSARY COMPLAINT WITHOUT LEAVE TO AMEND** DATE: 7/11/94 TIME: 10:00 A.M. COURTROOM: 8

A hearing was held on Plaintiff/Appellant Lillian Worthing Wyshak's appeal from the Bankruptcy Court's Order of April 19, 1994, dismissing the adversary complaint herein without leave to amend, on at 10:00 a.m.

on July 11, 1994, before the Honorable Manuel L. Real, District Court Judge presiding, in Courtroom 8 of the above-entitled court, located at 312 N. Spring Street, Los Angeles, California. Plaintiff/Appellant Lillian Worthing Wyshak appeared In Pro Per, and Defendants/Respondents American Savings Bank, F.A., Mario J. Antuci, John Donahue, Sheila Brown and Willis McClung appeared by attorney Richard Sontag, having filed a responding brief herein. There were no other appearances or opposition.

The Court having considered the various papers on file in this matter, and the argument of counsel, and good cause appearing:

IT IS HEREBY ORDERED that the Bankruptcy Court's Order of April 19, 1994, dismissing the adversary complaint herein without leave to amend, is affirmed. Defendants/Respondents' counsel to prepare an order.

Dated: July 28, 1994

/s/ Real
Manuel L. Real
U.S. District
Court Judge

Filed Aug. 22, 1994
Entered Aug. 24, 1994

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re: LILLIAN WORTHING WYSHAK, Debtor-in-Possession.	District Court Case No. CV-94-3649-R Bankruptcy Court Case No. LA 93-28978 KL Chapter 11
AMERICAN SAVINGS BANK, F.A., Movant/Respondent, vs. LILLIAN WORTHING WYSHAK, Respondent/Appellant,	**ORDER DENYING APPELLANT'S MOTION FOR REHEARING AND FURTHER AFFIRMING BANKRUPTCY COURT'S ORDER OF 2/11/94 GRANTING RELIEF FROM THE AUTOMATIC STAY** DATE: 8/22/94 TIME: 10:00 A.M. COURTROOM: 8

A hearing was held on Respondent/Appellant Lillian Worthing Wyshak's Motion for Rehearing on this Court's affirmance of the Bankruptcy Court's Order of February 11, 1994, granting relief from the automatic stay, at 10:00 a.m. on August 22, 1994, before the Honorable Manuel L. Real, District Court Judge presiding, in Courtroom 8 of

the above-entitled court, located at 312 N. Spring Street, Los Angeles, California. Respondent/Appellant Lillian Worthing Wyshak ("Wyshak") appeared In Pro Per, and Movant/Respondent American Savings Bank, F.A. ("ASB"), appeared by attorney Richard Sontag.

The Court having considered the various papers on file in this matter and in Appellant's Chapter 11 bankruptcy case, and the argument of counsel, and good cause appearing:

IT IS HEREBY ORDERED that Wyshak's Motion for Rehearing regarding this Court's affirmance of the Bankruptcy Court's Order of February 11, 1994, granting ASB relief from the automatic stay, is denied.

IT IS FURTHER ORDERED that the Bankruptcy Court's Order of February 11, 1994, granting ASB relief from the automatic stay, is hereby reaffirmed, the automatic stay in Wyshak's Chapter 11 bankruptcy is hereby immediately terminated and ASB may continue, and conclude, its non-judicial foreclosure of the subject property commonly known as and located at 602 Hillcrest Road, Beverly Hills, California 90210, and which is more particularly, and legally, described in Exhibit "A" attached hereto ~~including a waiver of the seven (7) day waiting period contained in California~~ Civil Code ~~§2924(d)~~.

Dated: Aug. 22, 1994

Manuel L. Real
Manuel L. Real
U.S. District
Court Judge

American Saving Bank, F.A., v. Wyshak
District Court Case #CV-94-1607-R
Chapter 11 Bankruptcy Case #LA 93-28978 KL

EXHIBIT "A" TO DISTRICT COURT'S ORDER DENYING MOTION FOR REHEARING

[Legal Description of Subject Property]

Lot 1 in Block 105 of Beverly Hills, in the City of Beverly Hills, in the County of Los Angeles, State of California, as per Map recorded in Book 85 Pages 86 to 92 inclusive of maps, in the office of the County Recorder of said county.

Filed Mar. 7, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: LILLIAN WORTHING WYSHAK, Debtor,	)	
LILLIAN WORTHING WYSHAK, Appellant, v. AMERICAN SAVINGS BANK, F.A.; MARIO J. ANTOCI; JOHN DONAHUE; SHEILA BROWN; WILLIS MCCLUNG; DOES 1 THROUGH 60, Appellees.	)	No. 94-56192 D.C. No. CV-94-01607-MLR
In re: LILLIAN WORTHING WYSHAK, Debtor,	)	
LILLIAN WORTHING WYSHAK,	)	No. 94-56271

Appellant,	)	D.C. No.
	)	CV-94-03649-MLR
v.	)	
	)	
AMERICAN SAVINGS BANK, F.A.; MARIO J. ANTOCI; JOHN DONAHUE; SHEILA BROWN; WILLIS MCCLUNG; DOES 1 THROUGH 60,	)	ORDER
	)	
Appellees.	)	

Appeal from the United States
District Court
for the Central District
of California
Manuel L. Real,
District Judge, Presiding

Submitted March 5, 1996*
Pasadena, California

Before: SKOPIL, CANBY, and LEAVY, Circuit Judges.

The district court's Order Denying Appellant's Motion for Rehearing and Further Affirming Bankruptcy Court's Order of February 11 1994, Granting Relief From the Automatic Stay, No. 94-56192, and its

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* The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Order Affirming Bankruptcy Court Order Dismissing Adversary Complaint, No. 94-56271, are AFFIRMED.

Filed Apr. 17, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: LILLIAN WORTHING WYSHAK, Debtor,	)	
LILLIAN WORTHING WYSHAK, Appellant, v. AMERICAN SAVINGS BANK, F.A.; MARIO J. ANTOCI; JOHN DONAHUE; SHEILA BROWN; WILLIS MCCLUNG; DOES 1 THROUGH 60, Appellees.	)	No. 94-56192 D.C. No. CV-94-01607-MLR
In re: LILLIAN WORTHING WYSHAK, Debtor,	)	
LILLIAN WORTHING WYSHAK,	)	No. 94-56271

Appellant,	)	D.C. No.
	)	CV-94-03649-MLR
v.	)	
	)	
AMERICAN SAVINGS BANK, F.A.; MARIO J. ANTOCI; JOHN DONAHUE; SHEILA BROWN; WILLIS MCCLUNG; DOES 1 THROUGH 60,	)	ORDER
	)	
Appellees.	)	

Before: SKOPIL, CANBY, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Canby and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Skopil has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.